Upper Tribunal for Scotland

[2022] UT01

Ref: UTS/AP/21/0015

DECISION OF SHERIFF TONY KELLY

ON AN APPLICATION FOR PERMISSION TO APPEAL (DECISION OF FIRST-TIER TRIBUNAL FOR SCOTLAND) IN THE CASE OF

Mr Graham Devine, 4 Gailes Park, Bothwell, G71 8TS

Appellant

- and -

Mr Juan Martine Bailo, 0/2, 159 Wellshot Road, Glasgow, G32 7AU

Respondent

FtT case reference FTS/HPC/CV/20/2084

11 June 2021

Decision

The Upper Tribunal refuses the appellant permission to appeal the decision of the First-tier Tribunal Housing and Property Chamber dated 23 March 2021.

Introduction

[1] In this case an application was made to the First Tier Tribunal ("FtT") for an order for payment in respect of excessive heating costs said to be attributable to a faulty boiler in respect of the property at 12 Caley Brae, Uddingston, G71 7TA. A case management discussion ("CMD) was

assigned for 5 January 2021. The appellant was not in attendance. The case was continued to a hearing on 12 February 2021. At that hearing both parties were in attendance. The FtT in its decision of 23 March 2021 made certain findings in fact. It decided that there was a fault in the boiler at the property and that this had caused additional costs to be incurred to the applicants. The FtT narrate the evidence from the applicants and questions posed to them by the appellant. The Tribunal goes on to narrate the evidence of the respondent (appellant) and questions posed to him. There were submissions made by both parties, and, at paragraphs 39 to 52, the FtT gives reasons for its decision and the assessment of loss to the applicants. It granted an order for payment against the appellant in favour of the applicants in the sum of the £1,344.45.

[2] Initially the appellant sought a review of that decision. There was communication between the appellant and the tribunal administration by email on 8 and 12 April 2021. The appellant withdrew his application to review the decision. Instead he sought permission to appeal the FtT decision. By decision dated 30 April 2021 the FtT refused permission to appeal. By application dated 31 May 2021 the appellant sought permission to appeal from the Upper Tribunal.

Application for Permission to Appeal

[3] Although parties are involved in a separate application for permission to appeal which I have recently considered and will therefore be aware of much of what is to immediately follow, for the avoidance of doubt I repeat here the approach which I will adopt in considering this application for permission. I propose to examine the basis of the decision to be arrived at by the Upper Tribunal

on such an application in terms of the statutory test that is applicable and then turn to the grounds of appeal set out by the appellant in his Form UTS-1.

Arguable

[4] In terms of rule 3(6) of the Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016, where the FtT has refused leave to appeal, the Upper Tribunal may give permission to appeal if "the Upper Tribunal is satisfied that there are arguable grounds for the appeal", section 46(4) of the Tribunals (Scotland) Act 2014. Nowhere in the statute or secondary legislation is the phrase "arguable grounds for the appeal" defined. Case law in other situations is of limited assistance. For example, in *Czerwinski v HM Advocate* 2015 SLT 610, the court was formulating the appropriate test for the grant of leave to appeal in an extradition case in the absence of statutory guidance. After reviewing several potential schemes or tests, it settled on adopting the test applicable to criminal appeals: "do the documents disclose arguable grounds of appeal", in terms of section 107 of the Criminal Procedure (Scotland) Act 1995. On that ground of appeal it said this:

> "Arguable in this context means that the appeal can properly be put forward on the professional responsibility of counsel"

[5] In *Wightman v Advocate General* 2018 SC 388 Lord President Carloway (at paragraph [9]) observed that arguability and statability were synonyms. That was said to be a lower threshold than "a real prospect of success", the test applicable in deciding whether to grant permission for an application to the supervisory jurisdiction to proceed, in terms of section 27D(3) of the Court of Session Act 1988, as amended, see [2] – [9].

[6] The threshold of arguability is therefore relatively low. An appellant does, however, require to set out the basis of a challenge from which can be divined a ground of appeal capable of being

argued at a full hearing. This is an important qualification or condition on appealing which serves a useful purpose. If no proper ground of appeal is capable of being formulated then there is clearly no point in wasting further time and resources in the matter proceeding. The respondent in a hopeless appeal ought not to have to meet any further procedure in a challenge with no merit. It is in the interests of justice that an appeal which is misconceived and is incapable of being articulated such that it cannot be characterised as arguable is stopped in its tracks.

Error or Point of Law

[7] *Advocate General for Scotland v Murray Group Holdings Ltd* [2015] CSIH 77; 2016 SC 201 (affirmed by UKSC in [2017] UKSC 45; 2018 SC (UKSC) 15) concerned an appeal from the Tax & Chancery Chamber of the First Tier Tribunal under section 13 of the Tribunals, Courts & Enforcement Act 2007. An appeal to the Upper Tribunal was available "on any point of law arising from the decision made by the First Tier Tribunal". The appeal thereafter to the Court of Session is "on any point of law arising from a decision made by the Upper Tribunal". It was in this context that the Inner House examined what was meant by "a point of law". It identified four different categories that an appeal on a point of law covers:

(i) General law, being the content of rules and the interpretation of statutory and other provisions;

(ii) The application of law to the facts as found by the First Tier Tribunal;

(iii) A finding, where there was no evidence, or was inconsistent with the evidence; and

(iv) An error of approach by the First Tier Tribunal, illustrated by the Inner House with examples: "such as asking the wrong question, or by taking account of manifestly irrelevant considerations or by arriving at a decision that no reasonable tax tribunal could properly reach." ([41]-[43])

[8] In essence, therefore, the task of the Upper Tribunal is to ascertain, with reference to the material submitted, whether the appellant has identified an error of law that is capable of being stated or argued before the Upper Tribunal at a hearing. That is a low bar. As with applications to the supervisory jurisdiction of the Court of Session at permission stage, the basis of a prima facie appeal ought to be capable of identification.

[9] An arguable ground of appeal should be easily identified. The Upper Tribunal ought not to be required to indulge in a thorough and detailed examination of the grounds of appeal as the arguable point or points should be apparent at the preliminary stage in what has been submitted with the permission application (Cf. *Wightman v Advocate General for Scotland* [2018] CSIH 18; 2018 S.C. 388)

Grounds of Appeal

[10] The appellant has submitted with his form UTS-1 a separate paper apart accompanied by a number of documents. That paper apart refers in turn to hearing 2084; decision notes 2084; review request; permission to appeal refusal and other points for consideration. Although on the face of it there appears to be some structure, the paper apart submitted with the permission to appeal is a running commentary which endeavours to mount a number of attacks or challenges to the FtT decision.

Conduct of the hearing

[11] The appellant narrates what he said happened at the hearing of 12 March 2021. At various points the appellant provides a description saying at one point that what occurred was demonstrative of "both bias and mistaken or deliberate misrepresentation of the events". When

referring to a separate application not before the Upper Tribunal in this appeal he states that what had happened in that case was illustrative of "a disturbing lack of objectivity and is yet another example of bias". Much of what is said about the conduct of the hearing by the appellant is his description of the factual differences which arose before the FtT and the appellant recording his sense of grievance with the factual decision arrived by the FtT.

[12] When the appellant moves on to provide notes on the decision of the FtT he provides paragraph numbers and what appears to be his commentary on, or annotation to, the decision. Again this has provided the appellant with an opportunity to assert his position relative to the facts found by the FtT. However, these amount to the appellant's assertions relative to the findings in fact arrived at by the FtT. The appeal which lies to the Upper Tribunal is restricted in terms of section 46(2)(b) of the 2014 Act to a point of law. That term is elaborated upon in the above mentioned case of *Murray*.

[13] In *Nelson* v *Allan Brothers & Company Ltd* 1913 SC 1003, an appeal was taken against a decision of a sheriff substitute in a workman compensation case. The sheriff substitute stated a case setting out the facts as found by him. He assoilzied the respondents. In that case the Inner House recognised that the facts were for the court (or arbitrator) of first instance. Lord Kinnear (at page 1006) opined that sustaining an appeal upon a question of fact would render the statutory limitation (on a question of law) on the appellate court "a dead letter". Lord Johnston concurred in that view. He said:

> "The position is that there is an absolute controversy between one of the parties and the Sheriff-substitute as to what the facts are. In that position the Sheriff-substitute is absolute master. He has found the facts, and to accede to the demand of the appellant here would really be allowing him to appeal or reclaim against a judgment on fact

> where the Sheriff-substitute holds one way and he happens to be disposed to hold another. In a case of that sort we cannot accede to the demand, which is really that we should instruct the Sheriff-substitute as to what facts he is to find."

[14] The appellant is in the same position here. He asserts that the FtT has erred on the facts and arrived at the wrong conclusion. The Upper Tribunal cannot interfere with the FtT findings in fact save for exceptional circumstances (which the appellant does not invoke or, in his application for permission says apply here). That does not found a competent ground of appeal in terms of section 46(4) of the 2014 Act.

[15] Similarly, although complaining of a lack of objectivity and bias, in reality the appellant takes issue with the decision of the FtT and contends that because it arrived at a decision with which he disagrees it is biased. The test for an appeal on the basis of the bias of a tribunal is whether:

> "the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased" per Lord Hope of Craighead in *Porter v Magill* [2002] 2 AC 357 at [103].

The material submitted by the appellant does not and could not meet this test.

[16] Dealing in brief with the other aspects of complaint contained in the paper apart, the appellant refers to a review request which he did not insist upon. That is not before the Upper Tribunal in this appeal. There is no complaint or challenge in this regard. The appellant passes comment upon the permission to appeal refusal. That is not, in any event, separately appealable – see section 55(2)(b) of the 2014 Act.

[17] The other matters mentioned under the heading of "Other points for consideration" represent a commentary on the FtT decision and a separate decision not before the Upper Tribunal

in this application for permission. Nothing in that narrative forms the basis of a discernible ground of appeal. The appellant makes repeated reference to an appeal application in a separate case which is not before the Upper Tribunal in this application for permission.

Conclusion

[18] The Upper Tribunal therefore refuses permission to appeal the decision of the First-tier Tribunal Housing and Property Chamber dated 23 March 2021.